Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

B. BRUCE KITTRELL,
Petitioner,

v.

STATE BAR OF CALIFORNIA,
Respondent.

On Writ of Certiorari
to the Supreme Court of California

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Was denial of cross-examination in the first Bar Trial, and refusal of the State Bar to produce witnesses in the second Bar Trial, a denial of Petitioner's statutory and constitutional right to cross examination?
2. Do policy considerations make the application of collateral estoppel improper in the case under review?
3. Even assuming that the application of the principles of collateral estoppel in this case was proper, do the facts of the case under review make application of collateral estoppel unfair or otherwise improper in this instance?
4. May an ambiguous punitive damages instruction under clear and convincing evidence be used as the basis of collateral estoppel, when the underlying civil liability was found under the standard of proof of preponderance of evidence?

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OPINIONS BELOW

The decision of the California Supreme Court denying Writ of Review was made on June 23, 2004, California Supreme Court case S122658. It is presently unpublished in the official Reports, but may be found at the California Supreme Court's web site at the following web address: http://www.courtinfo.ca.gov/courts/minutes/documents/SJUN2304.DOC.

The Second State Bar Review decision was issued on November 18, 2003, and is presently unpublished. The First State Bar Review decision was issued in 2000, and may be found at *In the Matter of Kittrell* (Review Dept 2000) 4 Cal.State.Bar.Ct.Rptr 195. The underlying Bar Trials are unpublished.

JURISDICTION

Jurisdiction arises under 28 U.S.C. section 1257(a).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment states in pertinent part, "No person shall be. . .deprived of. . .liberty or property, without due process of law."

The Fourteenth Amendment states in pertinent part, "No State shall… deprive any person of…. Liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The present case gives this Honorable Court the opportunity to clarify and affirm the right of an attorney to cross-examination of witnesses in attorney discipline cases, and as regards the propriety of application of collateral estoppel in attorney discipline cases.

In 1993, Czarine Hope James (James) filed a civil suit against Petitioner in the Orange County Superior Court, claiming, among other things, malpractice, fraud, and breach

of fiduciary duties. After trial in 1994, the jury (on a 9 to 3 basis) found Petitioner liable to James by a *preponderance of evidence* standard for the cause of action on fraud, in the liability portion of the trial. *Subsequently*, in the damages portion of the trial, punitive damages were awarded to James, pursuant to an ambiguous instruction requiring clear and *convincing* evidence. The OCTC has used this ambiguous damages instruction, which required clear and convincing evidence, as the basis for applying collateral estoppel on the issue of guilt.

Petitioner appealed to the Court of Appeals, which affirmed the jury's findings. Subsequently, the California Supreme Court rejected Petitioner's request to file a petition for review, on the grounds of untimeliness. Subsequently, the United States Supreme Court denied Petitioner's application for an extension of time to file a petition for a writ of certiorari.

Respondent State Bar of California (State Bar) subsequently filed disciplinary charges as against Petitioner. In July of 1997, Respondent State Bar, via its Office of the Chief Trial Counsel (OCTC) filed a motion in limine, seeking an order precluding Petitioner from relitigating issues previously litigated and found against him by clear and convincing evidence in the James lawsuit. The Review Department held that *only issues which were determined by clear and convincing evidence could be so found.*

Subsequently, in the First Bar Hearing as against Petitioner, OCTC had James testify, but the hearing judge denied Petitioner the opportunity of cross-examining her, and then struck her testimony, yet found Petitioner culpable of committing three violations of former rule 3-300, committing acts involving moral turpitude in violation of B & P. Code section 6106, and failing to report the adverse judgment in the James lawsuit, in violation of B & P. Code section

6068(o)(2), relying instead on the Superior Court Trial Transcript, and relying on findings *not* by clear and convincing evidence, but rather by preponderance of evidence. (Emphasis added)

Petitioner then requested review of the Hearing Judge's decision, which determined that the hearing judge had erroneously reweighed the evidence in the record in the James lawsuit under the clear and convincing standard of proof applicable to attorney discipline proceedings, and then relied upon that evidence to make his factual findings regarding the abovementioned alleged violations, without giving Petitioner an opportunity to attempt to contradict, temper, or explain the adverse evidence in that record. The Review Judge then remanded the matter for new hearing to grant such opportunity, but otherwise held that the principles of collateral estoppel, as stated in the case of *In the Matter of Applicant A*, 3 Cal.State.Bar.Ct.Rptr. 318, 329, a case involving application for admission to the bar by a new applicant, and not the taking of a license of an existing State bar member, were applicable as regards alleged violations of Business and Professions Code sections 6106 and 6068(o)(2).

In the second Bar Trial, OTCS, rather than providing the witnesses for cross-examination, instead stated that they would be relying on no further evidence, and would be calling *no* witnesses. Although Petitioner was still given no opportunity the complaining witness, which OTCS had called in the First Bar Trial, and calling no witnesses whatsoever, the hearing Judge in the Second-trial found Petitioner guilty on all charges. Further, the hearing judge determined that Petitioner had had sufficient opportunity to contradict, temper, or explain the evidence provided, made findings of fact which appear to be identical with the previous findings of fact made by the first Trial judge, and finally, made an order disbarring Petitioner. Upon a second

remand to the Review Department, that department failed to address the issues raised by Petitioner, but instead made an order reversing disbarment, and suspending Petitioner for three years, with such further suspension until Petitioner had made restitution to James in the amount of $221,516.41, plus interest on that sum at 10 percent per annum from November 21, 1994, plus costs. The Review Court filed its Transmittal of State Bar Recommendation with the Clerk of the California Supreme Court to the above effect on February 11, 2004.

Petitioner filed a Petition before the California Supreme Court requesting review of that Recommendation, that Petition was denied on June 23, 2004, and said suspension was to become effective as of July 24, 2004. Petitioner has therefore exhausted all available state remedies.

SUMMARY OF ARGUMENT

Petitioner brings the present Petition on the following grounds: that State Bar violated Petitioner's statutory and constitutional rights to confrontation and cross-examination of witnesses; that policy considerations prevent the application of collateral estoppel as against Petitioner; and that application of collateral estoppel would be unfair as against Petitioner, in that, among other things, there was no finding of guilt by clear and convincing evidence; therefore, such application should be rejected by this Honorable Court. Petitioner requests that, for the reasons given above, the present Order be revoked and the underlying case dismissed, or minimally, and in the alternative, that the matter be remanded for new hearing with appropriate instructions to Respondent State Bar.

ARGUMENT

I. Denial of Cross-Examination in the First Bar Trial, and refusal of the State Bar to produce witnesses in the

Second Bar Trial, were denials of Petitioner's statutory and constitutional rights of cross-examination.

As indicated in the State Bar Review Department's *Opinion on Review* dated November 18, 2003, page 12, *In the Matter of Kittrell* (Review Dept 2000) 4 Cal.State.Bar.Ct.Rptr 195 at 202, and in the transcript of the first Bar trial in the present matter, "the hearing judge erred in precluding respondent from fully cross-examining OCTC's witnesses during the discipline phase of the trial and from fully presenting mitigating evidence. . ." Subsequently, in the second Bar trial, the State Bar indicated that it would not present any further evidence or otherwise recall the witnesses, thus again preventing Petitioner from cross-examining the witnesses. *Opinion on Review, Nov. 18, 2003,* page 3.

For the following reasons, Petitioner contends that the State Bar's refusal to permit cross-examination in the first trial, and the State Bar's refusal to provide those witnesses for cross-examination in the second Bar trial, were and are denials of Petitioner's statutory and constitutional rights of cross-examination.

A. Statutory considerations.

Business and Professions Code section 6085 provides that any person complained against must have a fair, adequate and reasonable opportunity and right to defend against the charge by the introduction of evidence. In *Giddens v. State Bar* (1981), 28 Cal.3d 730, 170 Cal.Rptr. 812, 612 P.2d 851, the court determined that a failure to give an attorney the opportunity to cross examine witnesses entitled that attorney to a new hearing.

More importantly, Business and Professions Code section 6085(d) provides that an attorney complained against must have a fair, adequate, and reasonable opportunity and right to examine and cross-examine witnesses. (Emphasis

added) While under the cases of *McGrath v. State Bar of Cal.* (1943) 21 Cal.2d 737, 135 P.2d 1, and *Walter v. State Bar* (1970) 2 Cal.3d 880, 87 Cal.Rptr. 833, 471 P.2d 481, this provision is not violated where that party is not in fact a witness at any time in the proceedings, *McGrath* and *Walter* are inapplicable in the present matter, as the individuals had been called as witnesses in the first bar trial.

State Bar's claim that Petitioner could have called the witnesses himself does not satisfy the statutory requirement, as any testimony which he could have taken from them at that point would have been *rebuttal testimony*, and not cross-examination. In order to fulfill the statutory requirement that Petitioner be permitted to cross-examine the witnesses, the State Bar would have had to recall the witnesses, complete any direct testimony, and then offer the witnesses for cross-examination. State Bar's failure so to provide those witnesses was a denial of Petitioner's statutory right of cross-examination, and resulted in unfair hearings as against Petitioner.

B. Constitutional considerations.

Additionally, Petitioner asserts Federal and State constitutional rights to cross-examine witnesses. The United States Supreme Court first indicated, then held, that the Sixth Amendment right of confrontation is an element of federal due process. *Snyder v. Massachusetts* (1934) 291 U.S. 97, 106, 54 S.Ct. 330, 332, 78 L.Ed. 674, 678; Further, *Pointer v. Texas* (1965) 380 U.S. 400, 85 S.Ct. 1065, 1068, 13 L.Ed.2d. 923, 926 indicated that ". . .the Sixth Amendment's right of an accused to confront witnesses against him is likewise a fundamental right and is made obligatory on the States by the Fourteenth Amendment."

Further, the California Constitution was amended in 1974 to include a specific guarantee on the right to confrontation: "The defendant in a criminal cause has the

right . . . to be confronted with the witnesses against the defendant (Cal. Const., Art. I section 15). *People v. Contreras* (1976) 57 C.A.3d 816, 818 and 820, 129 Cal.Rptr. 397 indicates that the state confrontation right is identical to the federal right.

Additionally, the case of *In re Ruffalo* (1968) 390 U.S. 544, 550-551; 88 S.Ct.1222; 20 L.Ed. 117 indicates that attorney disciplinary proceedings are quasi-criminal, affording the attorney, and the petitioner, fundamental constitutional rights, among them, the Sixth Amendment right to cross-examination and confrontation of witnesses.

Finally, the case of *Brookhart v. Janis* (1966) 384 U.S. 1, 7, 16 L.Ed.2d. 314, 319, 86 S.Ct. 1245 indicates that where a criminal defendant has been denied the right of cross-examination, that a reversal of such hearing or trial is required.

Petitioner thus argues that he had both a statutory and constitutional right to cross-examine the witnesses called by the State Bar, that this right was denied, and that the cited authority indicates either that the underlying case should be dismissed, or, at minimum, a new hearing should be ordered in which Petitioner finally be granted the opportunity to cross-examine the witnesses, and that State Bar should be required to produce those witnesses.

III. Policy considerations make the application of collateral estoppel improper in the case under review.

In the underlying proceedings, Respondent made use of principles of collateral estoppel, as stated in *In the Matter of Applicant A* (1995) 3 Cal.State.Bar.Ct.Rptr. 318 at 329. In doing so, State Bar has utilized the principles of collateral estoppel applicable when a civil trial makes use of a ruling or judgment in a prior civil or criminal trial, as per the case of *Stolz v. Bank of America* (1993) 15 Cal.App.4th 217 at 222. *Stolz* in turn derived these principles from the cases of

Parklane Hosiery Co. v. Shore (1979) 439 U.S. 322, 330-331, 58 L.Ed. 552, 561-562, 99 S.Ct. 645 and *Imen v. Glassford* (1988) 201 Cal.App.3d 898, 905-908, Cal.Rptr. 514.

Interestingly, however, the case of *Imen v. Glassford* (1988) 201 Cal.App.3d 898, 247 Cal.Rptr. 514 deals with the propriety of the utilization of an administrative hearing's findings in equitable estoppel of a later civil trial. In *Imen* at 908, the court states: ". . .our holding has no detrimental affect (sic) on other public policy considerations that may in other situations work against application of the doctrine of collateral estoppel. (See e.g., *Standefer v. United States* (1980) 447 U.S. 10, 25 [64 L.Ed.2d 689, 701, 100 S.Ct. 1999]; Rest. 2d, Judgments, sections 29, com. *b* and 83, subds (3) and (4).

While the State Bar case of *In the Matter of Applicant A,* (1995) 3 Cal.State.Bar.Ct.Rptr. 318 at 329 recommends the use of collateral estoppel as a means of assisting in clearing the State Bar's admittedly overloaded docket, the case of *Standefer v. United States* at 701 stated a particular policy consideration which made application of collateral estoppel in that case improper:

> "*[T]he purpose of a criminal* court is not to provide a forum for the vindication of private rights. Rather it *is to vindicate the public interest in the enforcement of the criminal law while at the same time safeguarding the rights of the individual defendant. The public interest in the accuracy and justice of criminal results is greater than the concern for judicial economy professed in civil cases* and we are thus inclined to reject, at least as a general matter, a rule that would spread the effect of an erroneous acquittal to all those who participated in a particular criminal transaction. To plead crowded dockets as an excuse for not trying criminal defendants is

> in our view neither in the best interests of the courts, nor the public."
>
> In short, this criminal case involves "competing policy considerations" that outweigh the economy concerns that undergird the estoppel doctrine. See Restatement (Second) of Judgments section 68.1(e) and comments thereto (Tent Draft No. 3, 1976); cf. Commissioner v. Sunnen, 333 U.S. 591, 92 L.Ed. 898, 68 S.Ct. 715 (1949). *(Emphasis added)*

Petitioner argues that the general policy consideration as stated above in *Standefer,* of vindicating the public interest in enforcement of the criminal law, while at the same time safeguarding the rights of individual defendants, is applicable to the public interest of the disciplinary proceedings of the State Bar, which, while it is not a strict criminal proceeding per se, nonetheless, is a proceeding "the purpose of which is to protect the public and the profession from the objectionable activities of persons unfit to practice law." 1 Witkin, *California Procedure, 4th Ed.* Attorneys, section 623, citing *Marsh v. State Bar* (1934) 2 C.2d 75, 78, 39 P.2d 403; *In re Rothrock* (1940) 16 C.2d 449, 454, 106 P.2d 907; *Dudney v. State Bar* (1937) 8 C.2d 555, 563, 66 P.2d 1199; *Segretti v. State Bar* (1976) 15 C.3d 878, 886, 126 Cal.Rptr. 783, 544 P.2d 929.

Petitioner would therefore argue that the policy consideration as stated above in *Standefer*, of vindicating the public interest of enforcement of the disciplinary laws, while protecting the rights of the accused, outweighs the interest of the State Bar in using collateral estoppel as a means of clearing its dockets, and thus, application of collateral estoppel is improper in this case.

III. THE FACTS OF THE CASE UNDER REVIEW MAKE THE APPLICATION OF COLLATERAL

ESTOPPEL UNJUST AND OTHERWISE IMPROPER.

Respondents State Bar, in its Review Department's finding *In the Matter of Kittrell* (2000) 4 Cal.State.Bar.Rptr. 195, at 207, had attempted to hold that Petitioner failed to show any unfairness which would prevent application of collateral estoppel, under the standards for unfairness indicated by *In the Matter of Applicant A, supra.*

Additionally, Respondent, in their Review Department's *Opinion on Review,* filed November 18, 2003, on page 11 and 12, have attempted to assert that their opinion above "has become final and respondent [here Petitioner] cannot continue to attack our earlier holding regarding the doctrine of collateral estoppel."

Presumably, Respondent is relying upon California Rule of Court 954(b), to the effect that denial of review of their opinions constitutes a final judicial determination on the merits. Nonetheless, Business and Professions Code section 6084 (a) indicates that the Supreme Court, on its own motion, may review de novo a decision or order of the State Bar Court.

Petitioner will argue that applicable law and the facts of the present case indicate such unfairness as would prevent the application of collateral estoppel in this case, and that it would be in the interests of justice for this Honorable Court to make a de novo review of Respondent's prior holdings as regards this matter.

In *In the Matter of Applicant A,* 3 Cal.State.Bar.Ct.Rptr 318 at 329, Respondent State Bar, in its Review Department, stated the standards by which collateral estoppel would be applied:

"(1) that the issue resulting in the civil finding is substantially identical to the issue in the State Bar Court, (2) that the civil finding was made under the same burden

> of proof applicable to the substantially identical issue in the State Bar Court, (3) that the applicant was a party to the civil proceeding, (4) that there is a final judgment on the merites in the civil proceeding, and *(5) that no unfairness in precluding relitigation of the issue is demonstrated by the applicant.* (Cf. *Stolz v. Bank of America* (1993) 15 Cal.App.4th 217, 222). *(Emphasis added)*

Applicant A, supra, still citing *Stolz, supra*, also stated the standards which would make application of collateral estoppel unfair and improper:

> "An applicant may demonstrate that it would be unfair to bind him or her to an adverse civil finding by showing, among other things, *(1) that he or she had less incentive or motive to litigate the issue in the civil proceeding, (2) that the civil finding or judgment is itself inconsistent with some other finding or judgment, or (3) that he or she was required to litigate under different and less advantageous procedures in the civil proceeding. (ibid)" (Emphasis added)*

Petitioner will show, by the following, (A) that Petitioner had less incentive or motive to litigate the issue in the civil proceeding; (B) that the punitive damages finding is inconsistent with the other findings in the civil court, bearing indicia of prejudice,; and (C) that Petitioner was required to litigate under different and less advantageous procedures in the civil proceeding.

A. Petitioner had less incentive or motive to litigate the issue in the civil proceeding.

In the case of *Imen v. Glassford, supra* 201 Cal.App.3d 898 at 907, the Court of Appeals determined that Glassford would be more motivated to defend the right to his realtor's license in an administrative hearing, "the source of his income", than he would be to defend a civil suit for monetary

damages only, and that therefore there was no unfairness in the application of collateral estoppel for a later civil trial.

As corollary to the above principle stated in *Glassford*, Petitioner asserts that at the time of the original civil lawsuit, he was contemplating only the prospect of monetary damages, and not the loss of his license to practice law, which is both the source of his income and the means by which he would pay such damages. Had Petitioner known that the effect of the underlying civil judgment would be the loss of his license, Petitioner would have more diligently litigated that civil case, especially as regards his considerations as indicated in subsection (C), infra.

Petitioner therefore had less incentive to litigate the underlying civil case than the present disciplinary matter, and it would therefore be unfair to apply collateral estoppel in this instance.

B. The punitive damages finding is inconsistent with the other findings in the civil court, bearing indicia of prejudice.

As stated above, the civil findings in the guilt portion of the underlying civil trial for the cause of action for fraud was made by the jury on a 9 to 3 basis (with three of the jurors finding no liability whatsoever), and on the evidentiary standard of preponderance of the evidence.

Only after guilt was established, and during the damages portion of the hearing, did the court present the opportunity to the jury to exact punitive damages, but only on a supposed finding of clear and convincing evidence.

There is no law cited by the Respondent State Bar providing any authority that a punitive damage instruction under clear and convincing evidence, can be the basis for the application of collateral estoppel when the underlying liability was found by a preponderance of evidence.

Certainly, Petitioner can not find such authority. For this reason alone, collateral estoppel may not be applied.

Furthermore, the instruction by which the jury found that Petitioner was liable for punitive damages was ambiguous, in that it was for *either* oppression *or* malice *or* fraud, and for *either* fraud *or* breach of fiduciary duty.

Petitioner therefore argues that because of the disparity between the two types of judgment, and the ambiguity of the punitive damages instruction, there are indicia of prejudice as against Petitioner as an attorney. Petitioner believes that the punitive damages award, and the manner in which it was made, shows that it was made by a jury who held a prejudice against attorneys, and were willing, after establishment of alleged guilt, to claim a higher standard of proof in order to exact more damages from Petitioner.

In any event, Petitioner asserts that as there was a disparity between the two judgments, and as there are indicia of prejudice in the making of the award of punitive damages, that it would be unfair to apply collateral estoppel as regards that award.

C. Petitioner was required to litigate under different and less advantageous procedures in the civil proceeding.

Petitioner has been an attorney for 37 years, and in the course of his experience, has noted that in trials conducted on behalf of his clients, that juries tend to look more favorably upon elderly ladies, such as James, than upon successful businesspersons, especially when the former are plaintiffs and the latter are defendants.

Petitioner has also noted that when the defense of such businessmen is necessary, a rigorous or aggressive direct or cross-examination of elderly ladies tends to alienate juries, and tends to make juries look more favorably upon such plaintiffs.

As a result of this experience, Petitioner as a practical matter had to proceed more gently and less diligently in the direct and cross examination of James in the underlying civil suit, and as a practical matter, was required to litigate under less advantageous procedures than he would have in the later disciplinary hearing, where his license to practice law and his very livelihood were at stake. In consequence, Petitioner asserts that it would be unfair to permit collateral estoppel to be applied in this instance.

CONCLUSION

For the foregoing reasons, Petitioner argues that review of the present Petition by this honorable Court is proper, that Petitioner has been denied the statutory and constitutional right of cross-examination of witnesses, that policy considerations make utilization of collateral estoppel improper in this case, and in any event, that the facts of the underlying case and applicable law show that it would be unfair to apply collateral estoppel in this case. Petitioner therefore respectfully requests that this honorable Court revoke the Transmittal of State Bar Recommendations filed with this honorable Court on February 11, 2004, that the underlying disciplinary matter be dismissed, or at minimum, that it be remanded to new hearing with instructions consistent with this honorable Court's findings.

Verification of Petition

I declare under penalty of perjury that the above Petition is based on my own personal knowledge, information, and belief, and this verification is executed this 17th Day of July, 2004, at Torrance, California.

B. BRUCE KITTRELL
Petitioner Attorney *Pro Se*

APPENDIX

A. TEXT OF CALIFORNIA BAR COURT REVIEW DECISION DATED NOVEMBER 18, 2003 (SECOND BAR REVIEW)..... A1-15

B. TEXT OF CALIFORNIA BAR COURT REVIEW DECISION DATED OCTOBER 26, 2000 (FIRST BAR REVIEW)..... B1-14

C. TEXT OF DECISION OF CALIFORNIA SUPREME COURT, DENYING REVIEW OF PETITION FOR REVIEW, DATED JUNE 23, 2004..... C1

APPENDIX, A-1

REVIEW DEPARTMENT OF THE STATE BAR COURT

2003 Calif. Op. LEXIS 9

November 18, 2003

ACTION: [*1] OPINION ON REVIEW

PANEL: STOVITZ, P. J., WATAI, J., McELROY, J. *

* Hon. Patrice McElroy, Hearing Department Judge, sitting by designation, pursuant to the provisions of rule 305(e), Rules of Procedure of the State Bar.

COUNSEL: Hearing Judge Robert M. Talcott Counsel for the Parties

For State Bar of California: Janice G. Oehrle, Geri Von Freyman, Charles Weinstein, Office of the Chief Trial Counsel, The State Bar of California, 1149 S. Hill St., Los Angeles, CA 90015-2212

For Respondent: Bolden B. Kittrell, 25200 Crenshaw Blvd. # 201, Torrance, CA 90505

STOVITZ

OPINION:

Respondent, Bolden Bruce Kittrell, sought our review from a hearing judge's recommendation that he be disbarred. Respondent was admitted to practice in 1967 and has no prior record of discipline. The hearing judge found that respondent committed several serious violations of rule 3-300 of the Rules of Professional Conduct n1 regulating an attorney's conduct in a business transaction with an unsophisticated client who lost her life savings she had earmarked to use to buy a home. Following our earlier opinion in this proceeding (see *post*), the hearing judge also found respondent culpable of acts of moral turpitude while engaged in this [*2] business transaction proscribed by Business and Professions Code section 6106. n2 After

respondent's client won a civil fraud judgment against him, respondent was found to have violated section 6068, subdivision (o)(2) by failing to timely report entry of this judgment to the State Bar. Respondent has pressed a variety of substantive and procedural attacks on the findings. The State Bar urges that we adopt the hearing judge's decision and disbarment recommendation. Upon our independent review of the record (Cal. Rules of Court, rule 951.5; Rules Proc. of State Bar, rule 305(a); *In re Morse* (1995) 11 Cal.4th 184, 207), we uphold the hearing judge's findings and conclusions but recommend suspension, which we believe better comports with the discipline imposed in similar cases, while recognizing the serious evidence of aggravating circumstances in this case

n1 Unless noted otherwise, all references to rules are to the Rules of Professional Conduct of the State Bar. The version of rule 3-300 at issue here is that in effect between May 27, 1989, and September 13, 1992.

n2 Unless noted otherwise, all references to sections are to the Business and Professions Code. [*3]

I. Procedural Background.

This is the second plenary review we have conducted in this proceeding. In *In the Matter of Kittrell* (Review Dept. 2000) 4 Cal. State Bar Ct. Rptr. 195 (*Kittrell I*), we upheld the hearing judge's conclusions, applying principles of collateral estoppel, that respondent committed acts of moral turpitude (§ 6106) but remanded that matter to the hearing judge n3 to determine the nature and extent of those acts. We also adopted the hearing judge's conclusion that respondent violated section 6068, subdivision (o)(2) by failing to timely notify the State Bar of the entry of a fraud judgment in a civil suit brought by his former client. We noted that respondent did not challenge earlier this conclusion or the factual findings supporting it. (*Kittrell I, supra,* 4 Cal. State Bar Ct. Rptr. at p. 210.). We also

concluded that the application of collateral estoppel did not establish the elements of a violation of former rule 3-300, and we remanded this case to the hearing judge to make necessary findings of fact. Finally, we rejected the hearing judge's findings in mitigation and aggravation and remanded for the making of new findings and an appropriate [*4] recommendation of discipline. n4 Although we remanded this matter, we rejected respondent's argument that it was inappropriate to apply principles of collateral estoppel and his claim that the hearing judge was not impartial.

n3 On remand, the case was assigned to a different trial judge than heard the matter originally.

n4 The hearing judge in *Kittrell I* had recommended that respondent be suspended for five years, stayed, on conditions of probation including three years' actual suspension and until respondent established his entitlement to be returned to law practice.

On remand, we authorized the use of the evidence already made a part of the record but required that respondent be given an opportunity to "contradict, temper, or explain" that evidence.

In July 2001 the hearing judge conducted the remand hearing. The State Bar argued that the evidence already adduced proved the charges and chose to introduce no additional evidence. The hearing judge gave respondent ample and repeated opportunities to temper or explain the evidence and to present evidence favorable to him concerning the charges. Respondent declined to do so giving two reasons: that he did not want to waive [*5] any rights he had in view of a pending appeal before the Supreme Court of the United States and the evidence in *Kittrell I* already contained the evidence he would offer. After concluding that respondent was culpable of violations of the State Bar Act and former rule 3-300(A) and (B), and

that evidence of aggravating circumstances outweighed evidence in mitigation, the hearing judge recommended disbarment. Respondent's current appeal followed.

II. Findings and Legal Conclusions of Culpability.

Unlike in *Kittrell I,* the current findings of the hearing judge do not rest on application of collateral estoppel. Rather, the judge independently used the evidence adduced in the civil trial brought by respondent's client to prove the charges. We summarize the hearing judge's factual findings. Despite the extensive evidence, the essential facts are simple and not the subject of any reasonable dispute based on the record.

At the pertinent time, 1991, Czarine Hope James was a 55-year-old naturalized United States citizen who had completed the equivalent of the 12th grade in Jamaica. She had done computer data entry work, but in 1991 was employed as a clerk in a public storage facility [*6] earning about $ 6 per hour. She had minimal prior investment experience. She desired to purchase a condominium and was looking for an investment for her life savings of $ 68,000. n5 James's friend, Johnnie Maxey, had invested earlier with respondent and recommended him to James.

n5 James also had retirement accounts totaling about $ 12,000.

In addition to being an attorney, respondent owned Bolden Group and Bolden Realty. As he conceded, Bolden Group was the same as respondent in identity. Respondent used Bolden Realty to do business with equityholders in real estate who could not qualify for conventional bank loans. Respondent testified that none of his investors lost money in 12 to 15 years until the recession of 1992 to 1993, when he experienced problems with trust deeds. His own home of 17 years was foreclosed and sold in 1994.

In late November 1991, James met respondent in his law office. He gave James his law office's business card, mentioned he was an attorney but did not mention his ownership of Bolden Realty. At this time, James had asked respondent for legal advice about the tax consequences of her family law settlement. Respondent advised her at a later time after reviewing [*7] her documents.

Also, at this November 1991 meeting, respondent offered James an investment in a trust deed in Moro Landis Studios, commercial property in Studio City, which was principally used as a dance studio. At the time, respondent had no written appraisal of the property. However, he had invested in this property earlier, raising $ 600,000 from investors. He was aware that the property needed considerable improvements and that it was encumbered with first and second trust deed balances totaling $ 895,000. Together with the third trust deed balance held by respondent's realty group, the encumbrances on Moro Landis Studios totalled nearly $ 1.5 million. In contrast, the annual income of the property was $ 70,000 and the annual debt service on just the first and second trust deeds was $ 100,000.

In 1990 respondent listed Moro Landis Studios for $ 1.95 million but only received one offer below $ 1 million. He tried unsuccessfully to refinance the property in 1990 and 1991.

To obtain funds to service the debt on Moro Landis Studios, in March 1990 respondent issued a new third trust deed for $ 450,000. When the $ 450,000 note became due, and respondent was unable to refinance or sell [*8] the property for an adequate amount, he extended the note's due date to March 1993 and increased the note's amount to $ 550,000. To finance this note, he sought James's investment. A month before James's first meeting with respondent, the holder of the first trust deed on Moro

Landis Studios, Pacific Lighting Company, filed a notice of default on the property.

Between 1991 and 1993, respondent earned at least $ 244,000 in commissions and management fees from the Moro Landis Studios.

When respondent offered James an investment in the Moro Landis Studios in November 1991, he told her that it would pay 14 percent interest, that there would be monthly payments and that her principal would be repaid in 3 to 4 months. Although respondent told James that anything can happen, he also assured her that the Moro Landis Studios investment was a good one and that she could not lose money. Respondent did not consider James a sophisticated investor when he met her. Respondent did not inform James that the debt service on the Moro Landis Studios exceeded its income and that he had no current written appraisal on the property. n6 At this meeting, respondent did not give James any writing concerning [*9] her investment, nor did he inform her that she could seek the advice of independent counsel.

n6 At the time he met with James, respondent had two appraisals on Moro Landis Studios. One was four years old ($ 2.2 million appraised value) and the other three years old ($ 2.25 million appraised value). Based on an appraiser's testimony, the hearing judge found that as of November 1991, the property's fair market value was $ 725,000.

Within a week of her meeting respondent, James sent him $ 61,000 for her investment in the Moro Landis Studios. At respondent's request, James made the funds payable to Bolden Realty, but respondent did not inform James that he was Bolden Realty

By early January 1992, respondent had sent James her first monthly payment, and on January 9, he sent her a trust declaration and beneficiary agreement to sign and return. These papers failed to mention that James's investment was

in a third trust deed, did not recite the risks of the transaction and misstated that the note amount was $ 450,000 rather than $ 550,000. They also set the due date for return of James's principal as March 1, 1993, rather than the March 1992 date James had understood. When James called [*10] respondent about this, he assured her that she would have her funds back in April or May of 1992, and that the 1993 date was for convenience in case she wanted to reinvest her funds. Relying on respondent's statements, James signed the agreement; but she did not fully understand the nature of her investment or with whom it was placed.

By late February 1992, James had decided to purchase a condominium. Respondent told her that she would have her funds soon and James opened an escrow to buy the condominium. However, respondent did not return James's funds and her intended purchase of the condominium fell out of escrow. Again, relying on respondent's promise that he would return her investment soon, James opened a second escrow in summer 1992. Again, James's purchase was frustrated when respondent failed to return her funds and escrow had to be cancelled. The same thing happened a third time in fall 1992 when James opened an escrow to buy a home in a senior citizen community. By this time, respondent had ceased making interest payments to James. Respondent made 11 interest payments to James totaling $ 7,333.

Because of the three failed escrows, James spent $ 2,300 on escrow fees and [*11] had to pay storage charges for her personal property. The experience also caused James stress. As a result of losing her investment, James was forced to rent a room in a friend's home.

In April 1993, James sued respondent in Superior Court, Orange County, for several causes of action, including breach of fiduciary duty and fraud. After jury

verdict, the court awarded James compensatory damages of $ 217,235, plus interest and costs and exemplary damages of $ 61,000. The verdict found by clear and convincing evidence that respondent's conduct toward James involved malice, oppression or fraud. The judgment on the verdict was affirmed by the Court of Appeal, Fourth Appellate District, in an unpublished opinion. (*James v. Kittrell* (Oct. 16, 1996, G017179).) n7

n7 Although the opinion of the Court of Appeal is not for publication, it may be cited in this disciplinary proceeding. (Cal. Rules of Court, rule 977(b)(2).)

On appeal, the only issue respondent raised was the sufficiency of evidence to support the judgment. The appellate court found substantial evidence to support the judgment. Supporting the award of exemplary damages was evidence showing that respondent had sizeable personal [*12] assets. n8

n8 As the Court of Appeal, in its opinion, summarized respondent's testimony in the punitive damage phase of the civil trial, respondent owned and lived in an eight-acre equestrian estate in Rolling Hills which included a "main house, one bedroom guest house, swimming pool, tennis court, a six-stall barn and groom's quarters." This estate had been appraised at $ 2.9 million as of June, 1992. He also owned an airplane worth $ 125,000, owned an Arizona ranch worth $ 700,000, and leased 1991 Mercedes and Lincoln cars. During the three years prior to the civil trial, respondent conceded that he had made several hundred thousand dollars of deposits into his bank account. Respondent testified that his assets were encumbered for more than their value and he invested his deposits in other property. (*James v. Kittrell, supra,* (typescript opn.), p. 4.)

The Supreme Courts of California and of the United States each denied respondent's requests to file late petitions for review.

Respondent told the attorney who represented James in the civil litigation, Evan Borges, that he had no intention of paying James the judgment. Borges served pro bono for James, both defending respondent's [*13] attempts to defeat the judgment in bankruptcy proceedings and attempting unsuccessfully to collect for James on the judgment. When Borges tried to reach respondent's Arizona ranch, respondent transferred it to an entity owned by his wife. Borges did not have funds to continue to collect on the judgment.

Despite Borges's pro bono help to James, she was required to pay about $ 10,000 for the costs of the superior court and other actions. In 1994 James received about $ 27,000 from respondent's former law partners and $ 31,000 from the State Bar's Client Security Fund (CSF). In addition to the financial burdens, James's health suffered from her loss of funds. She broke out in a severe rash, and suffered dental problems which she could not afford to remedy. This caused gum problems and loss of several teeth. She also suffered from varying blood pressure, hair loss and depression.

Respondent contended that his assets have been foreclosed or sold in bankruptcy and his lifestyle is far more modest than before. His only income is from his law practice which had yielded about $ 100,000 in both 1996 and 1997. He claims that he had paid James $ 18,200 and offered to pay her an additional $ 17,400 [*14] but did not have those funds available. He also contends that his insurer had paid James. Respondent believed that he did not owe James any additional sums since she has recovered more than her original investment from him and from CSF.

From these findings, the hearing judge concluded that respondent wilfully violated rule 3-300(A) and (B), by, respectively, entering into a business transaction with James which was not fair and reasonable and was not fully

disclosed to James and failing to advise James in writing that she could consult independent counsel of her choice. In so concluding, the hearing judge determined that an attorney-client relationship existed between respondent and James in order to trigger rule 3-300 requirements and that the Moro Landis Studios transaction placed respondent in a position adverse to James.

The hearing judge also concluded that the moral turpitude which we had previously determined in *Kittrell I* respondent had committed, was evident in respondent's concealment to James, whom he knew to be an unsophisticated investor, of the risks of her investment in the Moro Landis Studios and in his self-dealing with that investment and failing to honor his [*15] commitment to repay James within three to four months.

Finally, the hearing judge incorporated in his decision our earlier dismissal in *Kittrell I* of the charge that respondent violated section 6068, subdivision (o)(1) and our earlier conclusion that respondent violated section 6068, subdivision (o)(2) by failing to report to the State Bar the judgment for fraud obtained by James.

III. Evidence in Aggravation and Mitigation and Hearing Judge's Recommendation.

Respondent had been admitted to practice for 24 years before the start of misconduct. The hearing judge gave this factor weight in mitigation.

Respondent presented testimony of two character witnesses. Gary W. Stephens, the acting director of corporate security of Sempra Energy, a large public utility, knew respondent for about 50 years in a business and personal relationship and considered him one of his closest friends. Stephens had a favorable opinion of respondent's character and considered him honest, generous and a person of integrity. Stephens had not heard of any State Bar proceedings concerning respondent but, based on

information from respondent, was generally familiar with the civil law suit brought against [*16] respondent by James. Stephens's mother had invested in the Moro Landis Studios and had lost money in that investment. Stephens and respondent loaned each other money over the years and respondent owed Stephens about $ 15,000.

Alex Dugally, retired at the time of his testimony, had been a deputy clerk of the Los Angeles Superior Court for 30 years and had known respondent as a friend and an attorney for between 25 and 30 years. As did Stephens, Dugally enjoyed a close social relationship with respondent. Dugally had a favorable opinion of respondent's character, terming respondent a person of high integrity.

The hearing judge gave this character evidence little weight for failing to meet the element in standard 1.2(e)(vi), Standards for Attorney Sanctions for Professional Misconduct, n9 that the evidence show an extraordinary demonstration of positive character by a wide range of legal and general references.

n9 Unless noted otherwise, all references to "standards" are to these Standards for Attorney Sanctions for Professional Misconduct, found in title IV of the Rules of Procedure of the State Bar.

The hearing judge found many factors to be aggravating on the issue of degree of [*17] discipline. These included the multiple acts of wrongdoing toward his client (std. 1.2(b)(ii)), his significant harm to James (std. 1.2(b)(iv)), his indifference to remedying the consequences of his misconduct (std 1.2(b)(v)), his continued assertion of contrary facts to those found by trial and appellate courts and that his misconduct was surrounded by dishonesty and concealment (std. 1.2(b)(iii)).

After weighing factors deemed appropriate and after reviewing other cases of attorneys' involvement with unfair

business transactions with their clients, the hearing judge recommended disbarment.

IV. Discussion.

A. Respondent's claims

Respondent levies a number of attacks on the recommendation and proceedings below, some of them reminiscent of his previous arguments in *Kittrell I.*

We shall group them into two broad categories: claims attacking the procedures utilized and those attacking the substantive findings and the recommendation.

1. Procedural attacks.

We begin with respondent's attack on the use of collateral estoppel. Our opinion in *Kittrell I,* determined that respondent's culpability of moral turpitude was established by application of the doctrine of collateral [*18] estoppel, but that the charged violations of rule 3-300 were not. (4 Cal. State Bar Ct. Rptr. at pp. 208-210.) That opinion has become final and respondent cannot continue to attack our earlier holding regarding the doctrine of collateral estoppel. Moreover, it is clear from the record of this proceeding, that the hearing judge did not rely on that doctrine to establish respondent's misconduct under rule 3-300, but used the evidence in the record to make independent and detailed findings. We have independently reviewed the record and, as we shall discuss *post,* in resolving respondent's attack on the substantive findings, those findings rest on clear and convincing evidence. Most of the findings are undisputed and rest on respondent's own testimony.

Also rendered final in *Kittrell I* is our finding, adopted by the hearing judge in *Kittrell II,* that respondent violated section 6068, subdivision (o)(2), by failing to report timely to the State Bar the entry of the fraud judgment against him in the civil action brought by James. Having failed to challenge this finding in his review of *Kittrell I* and we

having sustained that finding on an independent review, respondent cannot [*19] now seek to reopen the matter as he urges us to do. (Compare *In the Matter of Freydl* (Review Dept. 2001) 4 Cal. State Bar Ct. Rptr. 349, 357.)

Respondent argues that he was denied the right to present evidence or cross-examine witnesses in the first and second State Bar Court trials. Although our concern that respondent did not have an opportunity in the hearing below in *Kittrell I* to temper the evidence led to our remand to the hearing department in that first proceeding, there is absolutely no doubt that respondent received every reasonable opportunity to introduce evidence favorable to him in *Kittrell II.* The hearing judge extended repeated invitations to respondent to present his evidence. Except for very brief testimony or argument and the testimony of two character witnesses, respondent deliberately declined to offer further evidence. One of his grounds for declining was his incredulous assertion that any new evidence he offered would be redundant. His other reason for declining was also unmeritorious, that the United States Supreme Court was considering a pending appeal. In sum, having given respondent the express opportunity to present his evidence, his unpersuasive [*20] reasons for failing to do so cannot now be the basis of any claim of error. n10

n10 Respondent's claim that he was not given sufficiently timely information as to whether the State Bar would call certain witnesses and the location of those witnesses, even if established, did not obviate respondent from calling these witnesses on his own based on his own investigation of their whereabouts, if he wished to elicit their testimony.

2. Substantive attacks.

We have carefully reviewed respondent's substantive attacks on the findings and conclude that they are without merit.

Respondent's contention that the finding that he engaged in moral turpitude in violation of section 6106 is impermissibly vague echoes the belatedness of some of his procedural claims. Our decision in *Kittrell I* noted that respondent had made the same claim on review in that case. We resolved it against respondent (4 Cal. State Bar Ct. Rptr. at p. 209) and that determination has long since become final. n11

n11 In *Kittrell I,* we cited eight decisions defining the term "moral turpitude" or applying it to specific alleged conduct. (4 Cal. State Bar Ct. Rptr. at p. 208.)

Respondent argues that the civil [*21] action brought by James did not establish or present the issue of whether respondent wilfully violated rule 3-300. We agree that the purpose of the James civil action was to resolve civil causes of action, and not to decide whether the California Rules of Professional Conduct were violated to warrant discipline. But that does not serve to exonerate respondent, as the evidence introduced in that civil action, together with other evidence, did serve to establish clearly and convincingly that respondent wilfully violated the rule. A related claim by respondent, that the findings of the hearing judge are not supported by clear and convincing evidence, also is not meritorious.

B. Evidence and culpability conclusions.

There was ample clear and convincing evidence that respondent knew of the limited sophistication and educational level of his client, James, that he knew of her goal to use the principal invested to secure her own residence, that he knew of the distressed financial history of the Moro Landis Studios and still respondent recommended that James invest in a third trust deed as a "can't lose" investment maturing in just a few months. Respondent's admitted conduct proved clearly [*22] that he violated the provisions of rule 3-300. There is no dispute that

respondent failed to give James an adequate written description of the transaction and its essential terms necessary for her to be informed of the risks inherent in the junior trust deed in which she was investing. By his own testimony, respondent never informed James that she had an opportunity to seek the advice of independent counsel. James relied on respondent as her attorney and she first consulted him as her attorney. n12

n12 Although the existence of an attorney-client relationship is not disputed, one clearly existed in order to invoke the rule's requirements. (See *Beery v. State Bar* (1987) 43 Cal.3d 802, 811-812 (attorney-client relationship existed when client consulted attorney about preparation of a will at the same time that attorney induced client's entry into business transaction).)

In addition to respondent's utter failure to present James with a writing of the basic terms of the transaction, the transaction was neither fair nor reasonable to James.

Cases of business transactions between attorney and client which failed to comply with rule 3-300 or its predecessor, [*23] rule 5-101 are regrettably abundant. (See, e.g., *In the Matter of Peavey* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 483, 494-495; *In the Matter of Johnson* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 233, 243-244.) From these cases, it is clear that, among the purposes the rule serves, it is designed to recognize the very high level of trust a client reposes in his or her attorney and to ensure that that trust is not misplaced. (See *Rose v. State Bar* (1989) 49 Cal.3d 646, 662; *Beery v. State Bar, supra,* 43 Cal.3d 802, 812-813).

Sadly, this case stands with too many others as an example of an attorney's preference of his personal interests in manifest disregard of the interests of his client. (E.g., *In the Matter of Priamos* (Review Dept. 1998) 3 Cal. State Bar Ct. Rptr. 824, 829-830.) Without doubt, respondent's

wilful violations of rule 3-300 were multiple and significant and we uphold the hearing judge's findings and conclusions as to rule 3-300.

Although our conclusion that respondent engaged in acts of moral turpitude is final, the record on remand shows two bases for that conclusion: first, respondent [*24] concealed material facts and known risks from James about the Moro Landis Studios investment. (See *Rodgers v. State Bar* (1989) 48 Cal.3d 300, 315.) Specifically, respondent concealed that encumbrances on the property were greater than its market value, that respondent had no current appraisal on the property, that the property's debt service exceeded its income, that recent attempts to refinance or sell the property were unavailing and that the property had a history of defaults and foreclosure actions. Additionally respondent overreached James, knowing that James was respondent's client; had limited income, education and experience in investing; and was depending on the promised prompt return of her principal to use for housing. (Compare *In the Matter of Johnson, supra,* 3 Cal. State Bar Ct. Rptr. 233, 242-244.) Given the financially distressed history of the Moro Landis property, there was no reasonable way that the investment offered James was appropriate for either a sophisticated investor seeking to preserve principal, or for James who expected her funds to be returned shortly so that she could purchase a home. (See *Rose v. State Bar, supra,* 49 Cal.3d 646, 662-663.) [*25] We cannot escape the conclusion that these aspects of the transaction represent moral turpitude in violation of section 6106, under any of the definitions of moral turpitude adopted by the Supreme Court. (See *Kittrell I, supra,* 4 Cal. State Bar Ct. Rptr. at p. 208.)

C. Degree of discipline.

Past cases which involved centrally the entry into a business transaction with a client which either failed to

comply with the applicable rule of professional conduct or breached the attorney's fiduciary duty to the client have ranged widely from disbarment (*In the Matter of Priamos, supra,* 3 Cal. State Bar Ct. Rptr. 824) to reproval. (See cases discussed in *Rodgers v. State Bar, supra,* 48 Cal.3d at p. 318, and *In the Matter of Hultman* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 297, 308.)

Here respondent's misconduct extended beyond rule 3-300 offenses and into statutory violations, including moral turpitude. Accordingly, we must look to cases that reflect misconduct beyond violations of the Rules of Professional Conduct for fair guidance. In that light, we see as more comparable, *Rose v. State Bar, supra,* 49 Cal.3d 646; [*26] *Beery v. State Bar, supra,* 43 Cal.3d 802; *In the Matter of Peavey, supra,* 4 Cal. State Bar Ct. Rptr. 483; and *In the Matter of Johnson, supra,* 3 Cal. State Bar Ct. Rptr. 233.

Rose induced a widow with two children to invest $ 70,000 in a restaurant equipment business in which Rose was involved financially. The client had almost no business experience and limited resources, except for settlement funds which Rose had obtained for this client. Rose was found to have failed to disclose the significant risks of this investment with his client and failed to advise her to seek the advice of independent counsel. The Supreme Court found Rose culpable of misconduct in four other matters but also considered mitigating evidence in Rose's favor. It ordered a two-year actual suspension as a condition of probation.

Beery persuaded a severely injured client for whom he had recovered damages to invest $ 35,000 in a venture that would provide satellite television service to hotels and businesses. Beery failed to disclose his financial condition or his connection with the satellite venture; nor did he advise his client to seek the advice of independent counsel [*27] on the investment. When the satellite business

became unsuccessful, Beery defaulted on his personal guarantee to repay the loan. The Supreme Court found that Beery had concealed material facts and had abused the trust placed in him by his client. As in *Rose,* the Supreme Court suspended Beery for two years actual as a condition of probation.

A two-year actual suspension was also imposed in *Peavey.* There, the attorney solicited $ 25,000 loans or investments from each of two different clients in order to publish a book Peavey was writing. Peavey failed to disclose known risks and facts about the book venture and we found that he wilfully violated rule 3-300 in several respects in these transactions. Moreover, he failed to honor any part of civil judgments obtained by both clients against him; and similar to the present case, failed to report timely to the State Bar that one of the judgments was for fraud or intentional breach of fiduciary duty.

Finally, in *Johnson,* we found the attorney culpable of breaching her fiduciary duty to her sister-in-law who was also a client, represented by Johnson in recovering damages for personal injuries. We found that Johnson's unsecured loan [*28] of $ 20,000 was neither fair nor reasonable to her client who was in fragile health and unsophisticated in business matters, and we also found that Johnson had engaged in acts of moral turpitude by overreaching her client.

In their briefs on review, neither party cites cases guiding on the degree of discipline to recommend. However, at oral argument the State Bar suggested that the cases of *In the Matter of Priamos, supra,* 3 Cal. State Bar Ct. Rptr. 824, and *In the Matter of Wyshak* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 70, should guide us to recommend disbarment. We disagree as both cases involve decidedly more serious misconduct than presented here. *Wyshak* involved serious misconduct in a total of four

matters including two acts of defrauding sellers of real estate of hundreds of thousands of dollars in consideration in escrows Wyshak was administering. *Priamos* involved an attorney's repeated acts of self-dealing over a seven-year period in over $ 500,000 of the client's property coupled with Priamos's unilateral appropriation of $ 450,000 of his client's property for management fees.

We must also weigh mitigating and aggravating circumstances to achieve [*29] a balanced recommendation. (E.g, *Gary v. State Bar* (1988) 44 Cal.3d 820, 828.) We assign more weight in mitigation than the hearing judge to respondent's long years of practice without prior discipline (*In the Matter of Jeffers* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 211, 225; *Drociak v. State Bar* (1991) 52 Cal.3d 1085, 1090-1091) and we note with favor respondent's community service activities (*In the Matter of Spaith* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 511, 521). However, we agree with the hearing judge that respondent's character evidence is entitled to little weight as the two witnesses were social friends who hardly represented a broad showing contemplated by standard 1.2(e)(vi). (*In the Matter of Hagen* (Review Dept. 1992) 2 Cal. State Bar Ct. Rptr. 153, 171.)

We agree with the hearing judge's assessment of aggravating circumstances. We are most concerned with the multiple offenses; and, as the hearing judge observed in his decision, with respondent's "lack of insight, recognition or remorse for any of his wrongdoing." Respondent has still failed to reimburse the CSF for its payment to [*30] James on account of respondent's dishonest acts. We also share the judge's concern over respondent's litigation of this matter. Having won a remand from us to allow him an opportunity to present the evidence he claimed he was precluded from presenting in *Kittrell I,* respondent refused to present any evidence in *Kittrell II.* On review after remand, he insists on relitigating some claims which were,

long ago, finally resolved against him. On this record, it is difficult to avoid concluding that respondent's strategy has not been in good faith but primarily for delay.

Despite our sharing so many of the concerns of the hearing judge regarding respondent's offenses and its surrounding circumstances, we have concluded that disbarment is excessive, although we can appreciate many of the considerations which led the hearing judge to recommend it. At bottom, this transaction involved a single client. It appears most comparable to *Beery* and *Peavey*. Yet the confluence of aggravating circumstances we have cited, which we deem more serious than in either *Beery* or *Peavey*, particularly respondent's protracted indifference to making amends and his abiding lack of appreciation [*31] for his wrongdoing, cause us to conclude that the appropriate degree of discipline is suspension for five years, stayed, on conditions including a three-year actual suspension and until restitution is made n13 and proof of rehabilitation, fitness to practice and present learning and ability are established (see std. 1.4(c)(ii)).

n13 As to our recommendation to award restitution of the civil judgment won by respondent's client, as a condition of probation, see, e.g., *In the Matter of Peavey, supra,* 4 Cal. State Bar Ct. Rptr. at page 495.

V. Formal Recommendation.

For the foregoing reasons, we recommend that respondent, Bolden Bruce Kittrell, be suspended from the practice of law in California for five (5) years, that execution of that suspension be stayed and that respondent be placed on probation for a period of five (5) years on the following conditions:

1. That respondent be actually suspended from the practice of law for the first three (3) years of probation and until he has: a) made restitution to the State Bar's Client Security Fund in the sum of $ 31,000, plus interest thereon

at the rate of 10 percent simple interest per annum from the date of the payment by the [*32] Fund until repayment by respondent and statutory processing costs, representing the Fund's reimbursement of Czarine Hope James on account of the losses caused dishonestly by respondent; b) made restitution to Czarine Hope James in the sum of $ 221,516.41, plus interest thereon at the rate of 10 percent simple interest per annum from November 21, 1994, until paid in full and provides satisfactory proof of payment of such restitution to the State Bar's Office of Probation in Los Angeles and c) shown proof satisfactory to the State Bar Court of his rehabilitation, present fitness to practice, and present learning and ability in the general law in accordance with standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct.

2. Respondent must comply with the provisions of the State Bar Act, the Rules of Professional Conduct of the State Bar of California, and all the conditions of this probation.

3. Subject to the proper assertion of any applicable privilege, respondent must fully, promptly, and truthfully answer all inquiries of the State Bar's Office of Probation that are directed to respondent, whether orally or in writing, relating to whether respondent [*33] is complying or has complied with the conditions of this probation.

4. Respondent must report, in writing, to the State Bar's Office of Probation in Los Angeles no later than January 10, April 10, July 10 and October 10 of each year or part thereof in which respondent is on probation ("reporting dates"). However, if respondent's probation begins less than 30 days before a reporting date, respondent may submit the first report no later than the second reporting date after the beginning of respondent's probation. In each report, respondent must state that it covers the preceding calendar quarter or applicable portion thereof and certify by affidavit

or under penalty of perjury under the laws of the State of California as follows:

(a) in the first report, whether respondent has complied with all the provisions of the State Bar Act, Rules of Professional Conduct of the State Bar, and other terms and conditions of probation since the beginning of this probation; and

(b) in each subsequent report, whether respondent has complied with all the provisions of the State Bar Act, Rules of Professional Conduct of the State Bar, and other terms and conditions of probation during the period

During [*34] the last 20 days of this probation, respondent must submit a final report covering any period of probation remaining after and not covered by the last quarterly report required under this probation condition. In this final report, respondent must certify to the matters set forth in subparagraph (b) of this probation condition by affidavit or under penalty of perjury under the laws of the State of California.

5. Respondent must maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation in Los Angeles, his current office address and telephone number or, *if no office is maintained,* an address to be used for State Bar purposes. (Bus. & Prof. Code, § 6002.1, subd. (a).) Respondent must also maintain, with the State Bar's Membership Records Office *and* the State Bar's Office of Probation in Los Angeles, his current home address and telephone number. (See Bus. & Prof. Code, 6002.1, subd. (a)(5).) Respondent's home address and telephone number shall *not* be made available to the general public. (Bus. & Prof. Code, 6002.1, subd. (d).) Respondent must notify the Membership Records Office and the Office of Probation of any change in any of [*35] this information no later than 10 days after the change.

6. Within the period of his actual suspension, respondent must: (1) attend and satisfactorily complete the State Bar's Ethics School; and (2) provide satisfactory proof of completion of the school to the State Bar's Office of Probation in Los Angeles. This condition of probation is separate and apart from respondent's California Minimum Continuing Legal Education (MCLE) requirements; accordingly, respondent is ordered not to claim any MCLE credit for attending and completing this course. (Accord, Rules Proc. of State Bar, rule 3201.)

7. Respondent's probation shall commence on the effective date of the Supreme Court order in this matter. And, at the end of the probationary term, if he has complied with the terms and conditions of probation, the Supreme Court order suspending him from the practice of law for five years shall be satisfied, and the suspension shall terminate.

We further recommend that respondent be ordered to take and pass the Multistate Professional Responsibility Examination administered by the National Conference of Bar Examiners within the period of his actual suspension and to provide satisfactory proof of [*36] his passage of that examination to the State Bar's Office of Probation in Los Angeles within that same time period.

In addition, we recommend that respondent be ordered to comply with rule 955 of the California Rules of Court and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court order in this matter.

Finally, we recommend that costs incurred by the State Bar in this matter be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and that such costs be payable in accordance with Business and Professions Code section 6140.7.

CONCUR BY: WATAI, McELROY

APPENDIX, B-1

PUBLIC MATTER – DESIGNATED FOR PUBLICATION

Filed Oct 26, 2000
State Bar Court
Clerk's Office
Los Angeles

REVIEW DEPARTMENT OF THE STATE BAR COURT

In the Matter of	)	Case No. 95-0-14321
	)	
BOLDEN BRUCE KITTRELL	)	OPINION ON
	)	REVIEW
A Member of the State Bar	)	
	)	

Both respondent Bolden Bruce Kittrell[1] (respondent) and the State Bar, represented by its Office of the Chief Trial Counsel (OCTC), seek review of a hearing judge's recommendation that respondent be suspended from the practice of law for five years, that the suspension be stayed, and that respondent be placed on probation for four years on conditions including that respondent be actually suspended for three years and until he establishes his rehabilitation, present fitness to practice, and present learning in the law. The hearing judge's discipline recommendation is based upon his findings that, with respect to a business transaction with a 59-year-old woman of limited means, respondent committed three violations of the former Rules of Professional Conduct of the State Bar

[1] Respondent was admitted to the practice of law in the State of California in December 1967 and has been a member of the State Bar since that time.

that were effective from May 27, 1989 through September 13, 1992[2] and two violations of the Business and Professions Code.[3]

More specifically, the hearing judge found that, with respect to a business a transaction with Ms. Czarine Hope James (James), respondent committed two violations of former rule 3-300(A): first by entering into an unfair business transaction with James and second by entering into that transaction without disclosing the terms of the transaction to James in writing. The hearing judge also found that respondent violated former rule 3-300(B) by failing to inform James in writing that she could seek independent legal advice with respect to the transaction. Next, the hearing judge found that respondent violated section 6106 by engaging in acts of concealment and deception amounting to moral turpitude with respect to respondent's dealings with James. Finally, the hearing judge found that respondent violated section 6068, subdivision (o)(2) by failing to report, to the State Bar, the entry of a civil judgment against him for, among other things, fraud and breach of fiduciary duty with respect to the James business transaction.[4]

In making his findings that respondent violated former rule 3-300 and section 6106, the hearing judge applied

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[2] Unless otherwise indicated, all future references to former rules are to these former rules.

[3] Unless otherwise indicated, all future references to sections are to sections of the Business and Professions Code.

[4] OCTC also charged respondent with violating section 6068, subdivision (o)(1), which requires attorneys to report, to the State Bar, the filing of three or more lawsuits against them for legal malpractice in a twelve-month period. However, the hearing judge found that OCTC failed to establish such a violation. We agree, and accordingly, adopt that finding, but also dismiss the charge with prejudice (Rules Proc. Of State Bar, title II, State Bar Court Proceedings, rule 261(a)).

principles of collateral estoppel to bind respondent to the adverse civil judgment that James obtained against respondent in the Orange County Superior Court after an eight-day jury trial (the James lawsuit). The hearing judge applied those principles to preclude respondent, in this disciplinary proceeding, from relitigating the jury's findings in the James lawsuit that respondent defrauded and breached his fiduciary duty to James. Moreover, in addition to applying principles of collateral estoppel in this proceeding, the hearing judge also bound respondent to and relied upon the evidentiary record in the James lawsuit to find, at least, the former rule 3-300 violations, the nature and extent of the section 6106 violation, and various aggravating circumstances. The hearing judge bound respondent to and relied upon the civil record without giving respondent an opportunity to attempt to contradict, temper, or explain the adverse evidence in that record. In addition, on the basis that respondent was bound to the civil record, the hearing judge precluded respondent form fully cross-examining OCTC's witnesses during the discipline phases of the trial and from fully presenting his (i.e., respondent's) mitigation evidence.

Respondent raises numerous contentions challenging the propriety of the disciplinary trial and attaching the hearing judge's decision and discipline recommendation. We summarize respondent's contentions into the following categories. First, respondent contends that it is inappropriate to apply, in this disciplinary proceeding, principles of collateral estoppel with respect to the judgment in the James lawsuit. Next, respondent contents that even if those principles can be appropriately applied in this proceeding, their application neither establishes that he violated former rule 3-300 and section 6106 nor justifies the hearing judge's action in binding him to the evidentiary

record in the James lawsuit. Then, respondent contends that the hearing judge erred in precluding respondent from fully cross-examining OCTC's witnesses during the discipline phase of the trial and from fully presenting his mitigation evidence. Finally, respondent contends that he was denied due process because the hearing judge was not impartial since his judicial salary is paid by the State Bar.

On review OCTC asserts that all of respondent's contentions are meritless. In addition, it asserts that the hearing judge erred in not recommending respondent's disbarment.

After independently reviewing the record (Cal. Rules of Court, rule 951.5; Rules Proc. of State Bar, title II, State Bar Court Proceedings, rule 305(a); *In re Morse* (1995) 11 Cal.4th 184, 207), we conclude that principles of collateral estoppel can properly be applied in this proceeding and that their application establishes that respondent engaged in acts of moral turpitude in violation of section 6106. However, under the circumstances and record in this proceeding, the application of those principles does not establish the nature and extent of those acts. Nor does the application of those principles establish that respondent violated former rule 3-300.

Moreover, we agree with respondent's contentions that the hearing judge erred in binding respondent to and relying upon the evidentiary record in the James lawsuit to make, at a minimum, his findings regarding the nature and extent of the found former rule 3-300 and section 6106 violations and various aggravating circumstances without giving respondent an opportunity to contradict, temper, or explain the evidence in that civil record. We also agree with respondent's contentions that the hearing judge erred in precluding respondent from fully cross-examining OCTC's witnesses during the discipline phase of the trial

and in precluding respondent from fully presenting his mitigating evidence. On the other hand, we reject respondent's contention challenging the impartiality of the hearing judge.

Because the application of collateral estoppel principles neither establishes the nature and extent of respondent's acts of moral turpitude in violation of section 6106 nor the former rule 3-300 violations found by the hearing judge and because the hearing judge erred in binding respondent to the evidentiary record in the James lawsuit without giving respondent an opportunity to attempt to contract, temper, or explain that evidence, we must reverse the hearing judge's findings regarding the nature and extent of respondent's section 6106 violation as well as the hearing judge's findings that respondent violated former rule 3-300. Moreover, because the hearing judge erred in precluding respondent from fully cross-examining OCTC's witnesses during the discipline phase of the trail and from fully presenting his mitigating evidence, we must reverse the hearing judge's aggravation and mitigation findings.

Notwithstanding the foregoing reversals, we adopt the hearing judge's factual findings and legal conclusion that respondent violated section 6068, subdivision (o)(2).

Because we reverse most of the hearing judge's findings, we must also vacate his discipline recommendation and remand this matter for a new trial on all issues except the issues of respondent's culpability for violating section 6106, which we hold has been established under principles of collateral estoppel, and for violating section 6068, subdivision (o)(2), which we hold has been established by clear and convincing evidence independent of the application of collateral estoppel. Finally, in light of our order vacating the hearing judge's discipline recommendation and remanding the matter for further

proceedings, OCTC's contention that the hearing judge erred in not recommending that respondent be disbarred is moot and, therefore, not addressed.

I. Preliminary Factual Matters and Procedural History

In December 1991 James gave respondent $61,000 for investment purposes. One investment was in the amount of $7,000; the other investment was in the amount of $54,000. The disciplinary charges against respondent deal only with the $54,000 investment. The $54,000 investment was in a loan secured by a deed of trust on real property used as a dance studio in Studio City, California. That loan went into default and the deed of trust that was to secure it was extinguished by a superior trust deed. Accordingly, James lost all of her $54,000 investment and, as noted above, sued respondent.

James filed her lawsuit in 1993 and sued not only respondent, but also respondent's law partners and others. She sued them for, among other things, violating California and federal securities laws, legal malpractice, fraud, and breach of fiduciary duty. After trial in July 1994, the jury found respondent liable to James on each of James's causes of actions. The jury found, by a preponderance of the evidence, that respondent breached his fiduciary duties to James, that respondent defrauded James, and that, as a result of each of these wrongful acts, James incurred actual damages. The jury additionally found, by clear and convincing evidence, that respondent was guilty of oppression, malice, or fraud with respect to his breach of fiduciary duty or fraud.

Judgment was ultimately entered for James on her breach of fiduciary duty claim because it was the claim on which the jury awarded the most damages. In addition, because the jury found that respondent was guilty of oppression, malice, or fraud by clear and convincing evidence,

judgment was also entered for James on her claim for punitive damages. (Civ.Code, section 3294 [under 1987 amendments to this statute, punitive damages may be recovered in cases involving the breach of an obligation not arising in contract when it is proved by clear and convincing evidence that the defendant is guilty of oppression, malice, or fraud].) The jury awarded James $180,800 on her breach of fiduciary duty claim and $61,200 on her claim for punitive damages. After these two awards totaling $242,000 were increased to include prejudgment interest and reduced to give respondent credit of the settlement proceeds James received from respondent's law partners, a final judgment in the amount of $217,235.10 plus an additional $4,281.31 in costs was entered against respondent and in favor of James.

Respondent appealed the judgment on the sole ground that the evidence was insufficient to support the jury's findings. The court of appeal disagreed and affirmed the judgment. Thereafter, the California Supreme Court rejected respondent's request to file an untimely petition for review. Similarly, the United States Supreme Court denied respondent's application for an extension of time to file a petition for a writ of certiorari. At that time, the judgment became final.

In July 1997 OCTC filed a motion in limine in the hearing department. In that motion OCTC sought an order precluding respondent from relitigating those issues that were previously litigated and found against him by clear and convincing evidence in the James lawsuit. The hearing judge granted OCTC's motion. Respondent sought interlocutory review of the hearing judge's order. We denied that petition because no abuse of discretion or error of law was shown. In our order denying respondent's petition, we specifically pointed out that collateral estoppel

applies only to those issues that the jury in the James lawsuit found by clear and convincing evidence.

Thereafter, in April 1998, the hearing judge filed an order clarifying how the principles of collateral estoppel would be applied in this disciplinary proceeding. In his clarification order, the hearing judge correctly pointed out to the parties that the application of principles of collateral estoppel with respect to prior civil findings does not modify the fundamental requirement that, to establish a disciplinary violation, OCTC must prove each element of a charged violation by clear and convincing evidence. Thus, as the hearing judge correctly noted, the application of collateral estoppel will establish an element of a charged disciplinary violation only if that same element was previously found by the jury in the James lawsuit by clear and convincing evidence. As the hearing judge also correctly noted, if an element of a charged violation was not previously found by the jury by clear and convincing evidence, OCTC would be required to establish that element in this proceeding with clear and convincing evidence independent of the principles of collateral estoppel.

Notwithstanding the admonitions in our order denying respondent's petition for interlocutory review and the hearing judge's clarification order regarding the principles of collateral estoppel in this proceeding, OCTC attempted to establish the charged former rule 3-300 and section 6106 violations solely through the application of principles of collateral estoppel without presenting any references to the record or analysis showing where and how each element of the charged violation were found by the jury in the James lawsuit by clear and convincing evidence.[5] Instead, OCTC

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[5] OCTC did file, in the hearing department, two pleadings containing summaries and references to portions of the testimony and some of the exhibits in the James lawsuit. However, those references were only to

left it to the hearing judge to glean through the voluminous documents that it introduced into evidence and determine whether each element of the charged violations were found by the jury by clear and convincing evidence.

The voluminous documents OCTC introduced into evidence included copies of (1) the superior court's file in the James lawsuit (including the jury instructions and special verdicts, the judgment, the transcript of the trial, and the exhibits); (2) the court of appeal's opinion in the James lawsuit, and its order denying respondent's petition for rehearing; (3) a letter from the California Supreme Court refusing respondent's request for permission to late file a petition for review of the James lawsuit judgment; and (4) a letter from the United States Supreme Court denying respondent's request for an extension of time to file a petition for a writ of certiorari for review of the James lawsuit judgment.

After it introduced the foregoing documents, OCTC presented the testimony of a State Bar attorney with respect to the charged section 6068, subdivision (o)(2) violation. That attorney testified that respondent did not report, to the State Bar, the entry of the civil judgment against him the James lawsuit. Respondent cross-examined that witness, and OCTC then rested.

Respondent was then permitted to make an opening statement and to call one witness to testify. That witness is a former owner of the dance studio property that was to have been the collateral (under a third deed of trust) securing James's $54,000 investment/loan. That witness testified as to the improvements he made to the dance

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various portions of the civil record that OCTC believed to be of particular importance or relevance in this proceeding and not to the record references needed for the proper application of collateral estoppel.

studio and the studio's fair market value. When respondent attempted to testify in his own defense and to present exculpatory evidence as to the adverse jury findings, OCTC objected. The hearing judge sustained OCTC's objection and precluded respondent from presenting any other evidence with respect to the former rule 3-300 and section 6106 violations on the ground that he had previously granted OCTC's motion in limine to preclude respondent, under principles of collateral estoppel, from "retrying" the James lawsuit in this disciplinary proceeding.

The hearing judge gave the parties permission to file written closing statements and briefs on the issue of culpability. Thereafter, the hearing judge made tentative findings that respondent was culpable of misconduct, but did not specify the charges on which he found respondent culpable.[6] The hearing judge then scheduled a date for the disciplinary portion of the trial to begin.

During the disciplinary portion of the trial, OCTC presented its aggravating evidence first. OCTC had James testify as to the significant harm she suffered from respondent's misconduct. (Rule Proc. of State Bar, Title IV, Stds. For Atty. Sanctions for Prof. Misconduct (standards), std. 1.2(b)(iv) [harm aggravation].) OCTC also had James testify as to respondent's alleged misrepresentations to her regarding the terms of the transaction/loan and when he would return her $54,000 investment/loan to her. (Std. 1.2(b)(iii) [misconduct surrounded by dishonesty or bad

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[6] Respondent argues at some length that the hearing judge's failure to specify his culpability findings before the discipline phase of the trial prevented respondent from being able to adequately prepare for the discipline phase of the trial. Because we reverse the hearing judge's findings as to aggravating and mitigating circumstances and remand for a new trial on those issues, respondent's contention is moot and, therefore, not addressed.

faith aggravation].) The hearing judge precluded respondent from fully cross-examining James on the stated basis that he was not going to permit respondent to go into the facts of or retry the James lawsuit in the discipline phase of the trial.

OCTC also presented the testimony of Evan Borges, who was James's attorney in the James lawsuit. Attorney Borges testified that respondent lacks remorse over and an adequate understanding of the seriousness of his (i.e., respondent's) misconduct with respect to James. During respondent's cross-examination of attorney Borges, the hearing judge precluded respondent from going into any area that respondent asserted as a defense in the James lawsuit.

After OCTC presented its aggravation evidence, respondent presented his mitigation evidence. First, respondent testified on his own behalf. He gave a general overview of his extensive experience in dealings with loans secured by second and third deeds of trust on real property. When respondent attempted to testify as to his state of mind and his alleged good faith in dealing with James (std. 1.2(e)(ii) [good faith mitigation]), the hearing judge would not let respondent proceed. In addition, the hearing judge would not let respondent testify as to any aspect of his prior dealings or transactions with James on the stated basis that they were covered in the James lawsuit. The hearing judge also concluded that such testimony was not "a proper subject of mitigation evidence."

Second, respondent called three character witness. (Std. 1.2(e)(vi) [good character mitigation].) These witnesses all testified that they believed respondent to be of good character. Next, respondent pointed out to the hearing judge that he had additional evidence in mitigation, but that it was not "admissible" under the hearing judge's

rulings on the application of collateral estoppel. Respondent did not, however, make an offer of proof as to what that additional evidence would have been.

After respondent presented his three character witnesses, OCTC presented the testimony of two rebuttal witnesses. Both of these rebuttal witnesses testified that they did not believe to be of good character. Thereafter, the parties rested.

The hearing judge permitted the parties to file written closing statements. Subsequently, the hearing judge filed his decision. In his decision the hearing judge made extensive findings of fact regarding respondent's dealings with James. In addition, as we noted above, the hearing judge found respondent culpable of committing three violations of former rule 3-300, committing acts involving moral turpitude in violation of section 6106, and failing to report the adverse judgment in the James lawsuit to the State Bar in violation of section 6068, subdivision (o)(2). Finally, the hearing judge's decision and his evidentiary rulings at trial establish that he reweighed the evidence in the record in the James lawsuit under the clear and convincing standard of proof applicable to attorney disciplinary proceedings and then relied upon that evidence to make his factual findings regarding the former rule 3-300 and section 6106 violations and various aggravating circumstances without giving respondent an opportunity to attempt to contradict, temper, or explain the adverse evidence in that record.

II. Principles of Collateral Estoppel

Principles of collateral estoppel may be applied to preclude an attorney from relitigating, in the State Bar Court, "an issue that was actually litigated and resolved

adversely to [the attorney] in a prior civil proceeding, provided (1) that the issue resulting in the civil finding is substantially identical to the issue in the State Bar Court, (2) that the civil finding was made under the same burden of proof applicable to the substantially identical issue in the State Bar Court, (3) that the [attorney] was a party to the civil proceeding, (4) that there is a final judgment on the merits of the civil proceeding, and (5) that no unfairness in precluding relitigation of the issue is demonstrated by the [attorney]. [Citation.]" (*In the Matter of Applicant A* (Review Dept, 1995) 3 Cal.State Bar Ct. Rptr. 318, 329; see also *In the Matter of Berg* (Review Dept. 1997) 3 Cal.State Bar Ct. Rptr. 725, 731.)

Furthermore, in order for a civil finding to be given preclusive effect under collateral estoppel principles, it must have been necessary to the civil judgment (*McMillin Development, Inc. v. Home Buyers Warranty* (1998) 68 Cal.App.4th 896,906.) "This requirement 'prevent[s] the incidental or collateral determination of a nonessential issue from precluding reconsideration of that issue in later litigation." [Citation.] The requirement 'is necessary in the name of procedural fairness, if not due process itself. . . .' [Citation.]" (*Ibid.*)

The application of collateral estoppel principles in attorney disciplinary proceedings, does not alter the fundamental requirement that OCTC prove each element of a charged violation by clear and convincing evidence. (*Golden v. State Bar* (1931) 213 Cal. 237, 274.) Nor does the application of those principles alter the requirement that OCTC prove each element of an aggravating circumstance by clear and convincing evidence. (Std. 1.2(b); *Van Sloten v. State Bar* (1989) 48 Cal.3d 921, 933.)

The application of collateral estoppel principles can be applied only to preclude a respondent attorney from

relitigating, in the State Bar Court, an issue (i.e., fact) that was previously decided against him in a civil proceeding under the clear and convincing burden of proof. (*In the Matter of Applicant A, supra*, 3 Cal. State Bar Ct. Rptr. At p. 329.) Thus, if a factual element of a disciplinary violation or an aggravating circumstance has not previously been found against the respondent by clear and convincing evidence in a prior civil proceeding, OCTC must prove that element in the State Bar Court with clear and convincing evidence independent of the application of collateral estoppel. To prove such an element, OCTC may choose to rely, in whole or in part, upon the record in the prior civil proceeding as evidence.

Contrary to respondent's contention, the relevant testimony of a witness given in a prior civil proceeding is admissible in State Bar Court disciplinary proceedings without regard to the availability of the witness (sec 6049.2) and is to be reconsidered and weighed by the State Bar Court as though the witness were present and testifying before it (cf. Evid. Code sec. 312 [the finder of fact determines the weight and credibility of witnesses including hearsay declarants]; Code Civ. Proc., sec 2025, subd. (u) [deposition testimony must be considered as if it were given in court during trial]). Moreover, under Evidence Code section 452, subdivision (d), the State Bar Court can take judicial notice of the non-testimonial matters (i.e., the pleadings, exhibits, jury findings, and other court documents) in a civil action that involves the course of conduct underlying the disciplinary charges against an attorney. (*Rosenthal v. State Bar* (1987) 43 Cal.3d. 612, fn. 11, 633-634, citing *Caldwell v. State Bar* (1975) 13 Cal.3d 488, 496-497; *Yokozeki v. State Bar* (1974) 11 Cal.3d 436,444.)

Whether OCTC chooses to rely, in whole or in part, upon the record in a prior civil proceeding (whether testimonial evidence, non-testimonial matters, or both) to prove one or more elements of a disciplinary violation or an aggravating circumstance independent of the application of collateral estoppel, the evidence in the civil record as well as any factual findings made by the jury or the judge in the civil proceeding cannot be judicially noticed as conclusive or otherwise given preclusive effect in the State Bar Court, but must be assessed independently by the State Bar Court under the clear and convincing standard of proof applicable in attorney disciplinary proceedings. (*In the Matter of Applicant A., supra*, 3 Cal. State Bar Ct Rptr. At pp. 324-325, citing *Rosenthal v. State Bar, supra,* 43 Cal.3d at pp. 619-620, 634 and *Maltaman v. State Bar* (1987) 43 Cal.3d 924, 949-950, 947.) Moreover, contrary to OCTC's contentions, admissions made by a respondent attorney in a prior civil proceeding are not conclusive and cannot be given preclusive effect in the State Bar Court independently of the application of collateral estoppel even if they are admissible as party admissions under Evidence Code section 1220 (*Aronow v. LaCroix* (1990) 219 Cal.App.3d 1039, 1053.) Only final judgments and orders have preclusive effect. (*Ibid.*) Such party admissions must still be independently assessed under the clear and convincing standard of proof.

Finally, whatever OCTC chooses to rely, in whole or in part, upon the record in a prior civil proceeding to prove one or more element of a disciplinary violation or an aggravating circumstance independent of the application of collateral estoppel, the respondent must always be given a fair opportunity, in the State Bar Court, to contradict, temper, or explain the evidence in the civil record with other evidence, including live testimony from the same

witnesses who testified in the civil proceeding. (*In the Matter of Applicant A, supra*, 3 Cal. State Bar Ct. Rptr. At pp 324-325, and cases there cited.) But the respondent need not be given free reign to completely retry the civil suit in the State Bar Court with the identical evidence presented in the civil proceeding. As always, the hearing judge retains the discretion to restrict or exclude cumulative evidence. (*In the Matter of Wright* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 219, 226 [hearing judge may exclude cumulative evidence]; see also Evid. Code, sec 352 [judge may exclude evidence if its probative value is outweighed by the probability that its admission will necessitate the undue consumption of time]; *Dixon v. State Bar* (1982) 32 Cal.3d 728, 736 [hearing department has discretion to exercise reasonable control over evidence in order to avoid an unnecessarily long trial].)

III. Discussion

A. Section 6106 and Former Rule 3-300

For the reasons stated below we hold: that the principles of collateral estoppel can properly be applied in this proceeding; that their application establishes that respondent committed acts involving moral turpitude in violation of section 6106; but does not establish the nature and extent of those acts. We further hold the application of those principles does not establish that respondent violated former rule 3-300.

There is no dispute that respondent was a party to the James lawsuit and that the judgment in the James lawsuit is a final judgment on the merits. Furthermore, other than making a general claim that it would be unfair to apply principles of collateral estoppel against him in this proceeding, respondent did not specifically identify any

such unfairness. Respondent did not show that he had less incentive to litigate the issues in the James lawsuit, that the jury findings in the James lawsuit are inconsistent with the findings in another judicial proceeding, or that he was required to litigate under less advantageous procedures in the James lawsuit (*In the Matter of Applicant A, supra*, 3 Cal. State Bar Ct. Rptr. At 329, citing *Stolz v. Bank of America* (1993) 15 Cal.App.4th 217, 222; see also Rest.2d Judgments, sec 28 [listing various exceptions to the general rule of issue preclusion].) Accordingly, to determine whether principles of collateral estoppel can properly be applied in this proceeding, we must first determine whether there are any issues that are common to the James lawsuit and the present disciplinary proceeding. If there are, we must determine whether they were previously adjudicated against respondent by the jury in the James lawsuit under the clear and convincing standard of proof and whether they are necessary to support the civil judgment against respondent. If there are any issues meeting these requirements, we can give them preclusive effect and use them in this proceeding to find the corresponding element or elements of the charged disciplinary violations or alleged aggravating circumstances.

Our independent review of the record in the James lawsuit discloses that the only common issues that were found against respondent by the jury under the clear and convincing standard of proof and that are necessary to support the judgment in that lawsuit are those issues that the jury found when it unanimously answered "yes" to special finding 10.[7] Special finding 10 asked the jury

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[7] With respect to special finding 10, the jury was instructed that "[I]f you find that [James] suffered actual injury, harm, or damage caused by [respondent's] breach of fiduciary duty or fraud, you must decide in addition whether by clear and convincing evidence you find that there

whether it found "by clear and convincing evidence that [respondent] was guilty of malice, oppression or fraud in the conduct upon which [it based its] finding of liability for either breach of fiduciary duty or fraud."[8]

Because the superior court used the disjunctive conjunction "or" in the phrase "malice, oppression or fraud" in special finding 10, we cannot determine whether the jury found respondent guilt of (1) malice, (2) oppression, (3) fraud, or (4) some combination of malice, oppression, and fraud when it answered "yes" to that special finding. (Compare *In the Matter of Applicant A, supra,* 3 Cal. State Bar Ct. Rptr. At p.330 [where the civil

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was oppression, malice or fraud in the conduct on which you base your finding of liability." Because the jury found that James suffered actual damages as the result of respondent's breach of fiduciary duty and fraud, it went on to answer special finding 10.

[8] The jury was instructed to use the following definitions when answering special finding 10 (all of the original internal brackets in the following definitions have been omitted as unnecessary).

"'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of the that person's rights."

"'Malice' means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard for the rights of others. A person acts with conscious disregard of the rights of others when he [or] she is aware of the probable dangerous consequences of his [or] her conduct and willfully and deliberately fails to avoid those consequences." (Brackets added.)

"'Despicable conduct' is conduct which is so vile, contemptable, miserable, wretched, or loathsome that it would be looked down upon and despised by ordinary decent people."

"'Fraud' means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury."

judgment recites that the jury found Applicant A guilty of fraud by clear and convincing evidence]; *In the Matter of Berg, supra*, 3 Cal. State Bar Ct. Rptr. At p. 730-732 [where the civil jury found, by clear and convincing evidence, that Berg guilty of oppression, malice, and fraud with respect to his submitting false bills to an insurance company].) Similarly, because the superior court used the disjunctive correlative conjunction of "either. . .or" in the phrase "either breach of fiduciary duty or fraud" in special finding 10, we cannot determine whether the jury found that respondent was guilty of "malice, oppression or fraud" with respect to (1) his breach fiduciary duty to James, (2) his commission of fraud on James, or (3) both when it answered "yes" to that special finding. Nevertheless, as discussed below, we conclude that the commission of any or all of these acts involves moral turpitude in violation of section 6106, but that their commission does not establish that respondent violated former rule 3-300.

1. Section 6106

Section 6106 provides that an attorney's "commission of any act involving moral turpitude. . ., whether committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension." Moral turpitude has long been defined as an act "of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." (*In re Craig* (1938) 12 Cal.2d 93, 97.) "It has been described as any crim or misconduct without excuse [citation] or any dishonest or immoral act. The meaning and the test is the same whether the dishonest or immoral act is a felony, misdemeanor, or

no crime at all." (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 110.)

Moreover, "'[c]onduct which indicates that an attorney is unable to meet the professional and fiduciary duties of his practice may show him or her to be unfit to practice and constitute moral turpitude. [Citation.]" (*In re Strick* (1983) 34 cal.3d 891,901.) Thus, an attorney's deliberate breach of a fiduciary duty to a client involves moral turpitude as a matter of law. Further, even an attorney's non-deliberate breach of a fiduciary duty to a client involves moral turpitude if the breach occurred as a result of the attorney's gross carelessness and negligence. (*Lipson v. State Bar* (1991) 53 Cal.3d 1010, 1020; *In the Matter of Rubens* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 468, 478.) Furthermore, an attorney's deliberate breach of a fiduciary duty or a breach resulting from the attorney's gross carelessness and negligence involves moral turpitude even in the absence of an attorney-client relationship. That is because "[a]n attorney who accepts the responsibility of a fiduciary nature is held to the high standards of the legal professional whether or not he acts in his capacity of an attorney." (*Worth v. State Bar* (1976) 17 Cal.3d 337, 341; see also *Beery v. State Bar* (1987) 43 Cal.3d 802, 813.)

In light of the foregoing well-established law regarding moral turpitude, we conclude that an attorney's guilt of malice, oppression, or fraud, as those terms were defined for the jury in the James lawsuit, with respect to the attorney's breaching a fiduciary duty to either a client or a non-client involves moral turpitude in violation of 6106 as matter of law. Similarly, we conclude that an attorney's guilt of malice, oppression, or fraud with respect to his commission of an act of fraud, even in the absence of a fiduciary relationship, involves moral turpitude as a matter of law. (*In re Hallinan* (1954) 43 Cal.2d 243, 247-248

["Although the problem of defining moral turpitude is not without difficulty (citations), it is settled that whatever else it may mean, its includes fraud. . . .(Citations.) It is also settled that the related group of offenses involving intentional dishonesty for purposes of personal gain are crimes involving moral turpitude. (Citations.)].) Accordingly, we hold that, under the final judgment in the James lawsuit, the jury's answer to special issue 10 is a conclusive legal determination by clear and convincing evidence that respondent committed acts involving moral turpitude in his dealings with James and that that legal determination is binding on respondent and preclusive in this proceeding under principles of collateral estoppel. Those acts of moral turpitude establish all the requisite elements of a section 6106 violation.

However, because the superior court used, in special finding 10, the disjunctive conjunction "or" in the phrase "malice, oppression or fraud" and the disjunctive correlative conjunction "either. . .or" in the phrase "either breach of fiduciary duty or fraud," we cannot determine the factual basis for the jury's unanimous answer of "yes" to special finding 10. Because we cannot determine the factual basis for the jury's answer to special finding 10, 23 cannot determine the nature and extent of respondent's acts involving moral turpitude under the application of collateral estoppel principles. Nor can we determine the nature and extent of those acts by independently reviewing the record.

Even though the hearing judge properly admitted and judicially noticed the record in the James lawsuit (sec. 6049.2; Evid. Code, sec. 452, subd. (d)), he erred in relying upon it as evidence independent of the application of collateral estoppel principles (i.e., by reweighing the evidence in the civil record under the clear and convincing

standard of proof) without first giving respondent an opportunity to attempt to contradict, temper, or explain the adverse evidence in it. (*In the Matter of Applicant A, supra*, 3 Cal. State Bar Ct. Rptr. At pp. 324-325, and cases there cited.) We, therefore, must reverse the hearing judge's factual findings regarding the section 6106 violation. What is more, because the hearing judge did not give respondent an opportunity to attempt to contradict, temper, or explain the adverse evidence in the record in the James lawsuit, we cannot exercise our authority to independently review and reweigh the evidence in that civil record under the clear and convincing standard of proof to determine the nature and extent of respondent's acts of moral turpitude.

We find no merit to respondent's contention that the term "moral turpitude" in section 6106 is unconstitutionally vague. "It is well established that 'one to whose conduct a statute clearly applies may not successfully challenge it for vagueness." [Citation.]" (*In re Kelley* (1990) 52 Cal.3d 487, 497.) Thus, even assuming for the same of argument that the term "moral turpitude" in section 6106 is so broad that people of common intelligence must guess at its meaning, we could not sustain respondent's vagueness challenge because respondent's misconduct as found by the jury in its answer to special finding 10 falls clearly within the scope of section's 6106 proscription of acts involving moral turpitude. (*Ibid.*) Therefore, the term "moral turpitude" as used in section 6106 is not impermissibly vague as applied to respondent in this proceeding.

2. Former Rule 3-300

The requisite elements of a former rule 3-300(A) violation are that the transaction is unfair to the client or that the attorney failed to fully disclose and transmit the terms of the transaction to the client in writing in a manner

that the client should be able to understand. The requisite elements of a former rule 3-300(B) violation are that the attorney failed to advise the client in writing that the client may seek the advice of an independent attorney of the client's choice or that the attorney failed to give the client a reasonable opportunity to seek such independent advice. None of these elements was expressly addressed in special finding 10, which, as noted above, inquired of the jury whether it found "by clear and convincing evidence that [respondent] was guilty of malice, oppression or fraud in the conduct upon which [it based its] finding of liability for either breach of fiduciary duty or fraud." Furthermore, none of the elements of a former rule 3-300 violation are expressly addressed in the definitions given to the jury with respect to special finding 10, which definitions are quoted above in footnote 10. Thus, the application of collateral estoppel principles does not establish that respondent violated former rule 3-300.

Moreover, in making his factual findings regarding the former rule 3-300 violations, the hearing judge erred in reweighing the evidence in the James lawsuit under the clear and convincing standard of proof without first giving respondent an opportunity to attempt to contradict, temper, or explain that evidence. (*In the Matter of Applicant A, supra*, 3 Cal. State Bar Ct. Rptr. at pp. 324-325, and cases there cited.) Because of that error, we cannot exercise our authority to independently review and reweigh the evidence in the James lawsuit under the clear and convincing standard of proof and make our own findings with respect to the charged former rule 3-300 violations.

In sum, we reverse the hearing judge's factual findings and legal conclusions that respondent violated former rule 3-300 and remand the matter for a new trial with respect to the charged former rule 3-300 violations.

In sum, we reverse the hearing judge's factual findings and legal conclusions that respondent violated former rule 3-300 and remand the matter for a new trial on the issue of respondent's culpability on the charged former rule 3-300 violations.

B. Section 6068, subdivision (o)(2)

Respondent does not challenge the hearing judge's factual findings showing that respondent failed to report, to the State Bar, the entry of the judgment against him in the James lawsuit. Nor does respondent challenge the hearing judge's culpability conclusion that respondent's failure to report the judgment violated section 6068, subdivision (o)(2). After independently reviewing the record, we agree with the hearing judge and adopt his factual findings and culpability conclusion regarding this charge.

C. Aggravating and Mitigating Circumstances

Aggravating and mitigating circumstances are events or factors surrounding the particular misconduct of which an attorney has been found culpable that show that a greater or lesser degree of sanction is warranted. (Stds. 1.2(b) & 1.2(e).) In that regard, aggravating and mitigating circumstances are often directly related to or dependent upon the specific misconduct found to have been committed. (See, e.g., std. 1.2(b)(ii) [found misconduct evidences multiple bad acts]; std. 1.2(b)(iii) [found misconduct surrounded or followed by bad faith]; std. 1.2(e)(ii)[good faith of attorney]; std. 1.2(e)(vii) [objective steps take by attorney to atone for consequences of the found misconduct].) Accordingly, because we have reversed most of the hearing judge's findings and conclusions regarding respondent's culpability, we also reverse the hearing judge's findings as to aggravating and

mitigating circumstances. We do so in order to provide both parties with an adequate opportunity to present their aggravating and mitigating evidence with respect to whatever particular misconduct may be found on remand.

In any event, for the reasons stated above, the application of collateral estoppel principles does not provide support for the hearing judge's aggravation fidings. As with culpability, in making some of his findings in aggravation, the hearing judge reweighed the evidence in the James lawsuit without first giving respondent an opportunity to contradict, temper, or explain the adverse evidence. In addition, the hearing judge did not give respondent an opportunity to present all of his relevant mitigating evidence. These errors also require that we reverse the hearing judge's findings regarding aggravating and mitigating circumstances and preclude us from exercising our authority to independently reweigh the evidence.

D. The Hearing Judge was Impartial

Finally, we address one remaining issue raised by respondent because it is germane to further proceedings in the hearing department on remand. Under the most generous of readings, we construe respondent's contention regarding the hearing judge's impartiality as arguing that the hearing judge was not impartial because the State Bar pays his judicial salary as mandated under section 6079.1, subdivision (d) and because the State Bar was in a funding crisis as a result of the governor's veto of the State Bar's fee bill in 1997. Respondent does not contend and cite to the place in the record where he timely filed a motion seeking to disqualify the hearing judge on these grounds as required by rule 106 of the Rules of Procedure of the State Bar, title II, State Bar Court Proceedings, and where that

motion was denied. By not properly raising this issue, respondent has waived any error. (Rules Proc. of State Bar, title II, State Bar Court Proceedings, rule 302(a); State Bar Court Rules of Practice, rule 1320; *In the Matter of Berg, supra*, 3 Cal. State Bar Ct. Rptr. at p. 736.) Nonetheless, we exercise our discretion and address respondent's arguments on the merits in the interest of justice.

We have repeatedly rejected as meritless arguments that a hearing judge is not impartial because the State Bar pays the judge's statutorily mandated salary. (See, e.g., *In the Matter of Acuna* (Review Dept. 1996) 3 Cal. State Bar Ct. Rptr. 495, 500-501; *In the Matter of Stewart* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 52, 59.) Moreover, the fact that the State Bar might use a portion of the costs that it recovers from disciplined attorneys to pay the hearing judge's salary does not create a disqualifying condition. That is primarily because the vast majority of all costs recovered are recovered in accordance with a Supreme Court disciplinary order (not a State Bar Court order) that includes an award of costs to the State Bar in accordance with the statutory provision for costs in section 6086.10 (CF. *In re Rose* (2000) 22 Cal.4th 430, 439, citing *In re Attorney Disciplinary System* (1998) 19 Cal.4th 582, 600-601 [before the Supreme Court issues disciplinary order, it exercises its independent and inherent jurisdiction over attorney discipline and independently determines whether to impose the discipline recommended by the State Bar Court].) Respondent cannot plausibly contend that the Supreme court's independent and statutory award of costs to the State Bar, even if made on the recommendation of the State Bar Court, creates a condition disqualifying the State Bar Court. (Accord *In the Matter of Stewart, supra*, 3 Cal. State Bar Ct. Rptr. at p. 59.)

The only instance in which the State Bar Court can assess costs on disciplined attorneys is in those cases in which the State Bar Court publicly reproves the attorney. (sec. 6086.10, subd. (a).) Respondent was not publicly reproved.

Moreover, the fact that a portion of the hearing judge's salary might conceivably be paid from part of the costs the State Bar recovers from disciplined attorneys does not create a disqualifying condition because the amount of costs actually recovered are relatively nominal to the State Bar's budget. (*In the Matter of Acuna, supra*, 3 Cal. State Bar Ct. Rptr. at p. 501, fn.2; compare *Ward v. Village of Monroeville, Ohio* (1973) 409 U.S. 57, 60 [where the mayor of Monroeville was disqualified from acting as the judge in ordinance and traffic violation cases because the fines and costs recovered for ordinance and traffic violations made up a major portion of the village's income and because the mayor had executive authority over the village's finances].)

Finally, we also reject as meritless respondent's argument that the hearing judge was not impartial because the State Bar was in a funding crisis in 1998 during part of the trial in this matter and while this matter was under submission for a decision by the hearing judge. Throughout the State Bar's funding crisis in 1998 and early 1999, the State Bar Court Judges voluntarily agreed to temporarily receive a reduced salary from the State Bar. (*In re Attorney Disciplinary System, supra*, 19 Cal.4th at p. 614.) We fail to see how such a voluntary reduction in salary to permit the State Bar to operate within its budgetary constraints under rule 963 of the California Rules of Court could have plausibly created a financial interest that would have required the recusal of the hearing judge.

IV. Remand Order

Applying principles of collateral estoppel, we conclude that respondent Bolden Bruce Kittrell is culpable of violating Business and Professions Code sections 6106. Moreover, adopting the hearing judge's findings of fact and conclusions of law with respect to the charged violation of Business and Professions Code section 6068, subdivision (o)(2), we conclude that respondent is culpable of that charged violation.

In light of the foregoing conclusions and our reversal of most of the hearing judge's findings and conclusions, we order that this matter be remanded to the hearing department for a new trial on the following issues: (1) findings of fact surrounding respondent's violation of Business and Professions Code section 6106; (2) findings of fact and conclusions of law regarding the charged violations of rule 3-300 of the former Rules of Professional Conduct of the State Bar; (3) findings of fact and conclusions of law regarding aggravating and mitigating circumstances; and (4) the appropriate level of discipline.

On remand, the evidence shall be reopened as to both parties with respect to the above issues. However, the evidence that is presently part of the record need not be re-introduced. Moreover, the record of the James lawsuit, which is admitted into evidence in the hearing department, may be properly considered on remand by the hearing judge. However, respondent must be given a fair opportunity to contradict, temper, or explain that evidence with other evidence, including live testimony from the same witnesses who testified in the civil proceeding. Yet the hearing judge need not retry the civil suit in this disciplinary proceeding as she or he retains the sound discretion to restrict or exclude cumulative evidence and otherwise control the introduction of evidence as in any

other case. The hearing judge's decision on remand should, again as in any other case, be based on a balanced consideration of all the competent evidence admitted, whether documentary, hearsay, live testimony, or other.

NORIAN, J.

We concur:

OBRIEN, P.J.
STOVITZ, J.

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James W. Obrien
Presiding Judge

APPENDIX, C-1

http://www.courtinfo.ca.gov/courts/minutes/documents/SJUN2304.DOC

TEXT OF DECISION OF CALIFORNIA SUPREME COURT
DATED JUNE 23, 2004

Petition for writ of review DENIED.

It is ordered that **Bolden Bruce Kittrell, State Bar Number 40896**, be suspended from the practice of law in California for five years, that execution of that suspension be stayed, and that he be placed on probation for a period of five years on the conditions recommended by the Review Department of the State Bar Court in its opinion filed on November 18, 2003, including the condition that he be actually suspended from the practice of law for the first three years of probation and until he: (1) makes restitution to the State Bar's Client Security Fund in the sum of $31,000, plus interest thereon at the rate of 10 percent simple interest per annum from the date of the payment by the Fund until repayment by respondent and statutory processing costs, representing the Fund's reimbursement of Czarine Hope James on account of the losses caused dishonestly by respondent; (2) makes restitution to Czarine Hope James in the sum of $221,516.41, plus interest thereon at the rate of 10 percent simple interest per annum from November 21, 1994, until paid in full, and provides satisfactory proof of payment of such restitution to the State Bar's Office of Probation in Los Angeles; and (3) shows proof satisfactory to the State Bar Court of his rehabilitation, present fitness to practice, and present learning and ability in the general law in accordance with standard 1.4(c)(ii) of the Standards for Attorney Sanctions for Professional Misconduct. Respondent is also ordered to take and pass the Multistate

Professional Responsibility Examination within the period of his actual suspension and to provide satisfactory proof of his passage of that examination to the State Bar's Office of Probation in Los Angeles within that same time period. (See *Segretti* v. *State Bar* (1976) 15 Cal.3d 878, 891, fn. 8.) Respondent is further ordered to comply with rule 955 of the California Rules of Court and to perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of this order.* Costs are awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and payable in accordance with Business and Professions Code section 6140.7

*(See Bus. & Prof. Code, § 6126, subd. (c).)